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A

Tamabina Sdn Bhd & Anor v Nakamichi Corp Bhd

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–2439–11 OF 2013

MOHD HISHAMUDIN, LINTON ALBERT AND ZAWAWI SALLEH JJCA

17 MARCH 2014

C

Civil Procedure — Appeal — Stay of execution — Incidental directions and interim orders — Appellant applying to Court of Appeal for stay pending appeal without making prior application for stay to the High Court — Application for stay to be made pursuant to s 44 of the Courts of Judicature Act 1964 — Whether abuse of process — Courts of Judicature Act 1964 ss 43, 44 & 73

D

The High Court had allowed the respondent/plaintiff's application pursuant to s 150 of the Companies Act 1965 and had ordered the first appellant/first defendant ('Tamabina') to, among others, call for an extraordinary general meeting of shareholders within seven days of the date of the order ('the order'). This was in relation to a dispute regarding the management of Tamabina. The appellants made the present application to the Court of Appeal for a stay of the execution of the order. The respondent opposing the application on the grounds that it was an abuse of process of the court: (a) by purporting to invoke s 44 of the Courts of Judicature Act 1964 ('the Act'); and (b) by reason of non-compliance with s 43 of the Act.

E

F

Held, dismissing the application with costs:

G

(1) Section 43 of the Act stipulates that there has to be a prior application made before the High Court by the appellants for a stay of execution of the order. In the present case, there had been no prior application made at the High Court (see paras 10–11).

H

(2) The appellants had not given any reason for invoking s 44 of the Act; or for not having made the prior application before the High Court (see para 13).

I

(3) The application here was in the nature of a stay of execution and this being the case, the application ought to have been made pursuant to s 73 of the Act, read with s 43 of the Act. The application should not have been made pursuant to s 44 of the Act. Making the application purportedly pursuant to s 44 of the Act was an abuse of that section (see para 16).

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[Bahasa Malaysia summary

Mahkamah Tinggi telah membenarkan permohonan responden/plaintif berikutan s 150 Akta Syarikat 1965 dan memerintah perayu pertama/defendan pertama ('Tamabina') untuk, antara lain, memanggil untuk mesyuarat agung yang luar biasa bagi pemegang-pemegang saham dalam masa tujuh hari dari tarikh perintah ('perintah'). Ini adalah berkaitan pertikaian berkenaan pengurusan Tamabina. Perayu-perayu membuat permohonan ini ke Mahkamah Rayuan untuk penangguhan pelaksanaan perintah tersebut. Responden membantah permohonan tersebut atas alasan bahawa ia adalah penyalahgunaan proses mahkamah: (a) dengan mendakwa untuk membangkitkan s 44 Akta Mahkamah Kehakiman 1964 ('Akta'); dan (b) atas sebab ketidakpatuhan dengan s 43 Akta.

Diputuskan, menolak permohonan dengan kos:

(1) Seksyen 43 Akta menyatakan bahawa patut terdapat permohonan sebelumnya yang dibuat di hadapan mahkamah Tinggi oleh perayu-perayu untuk penangguhan pelaksanaan perintah tersebut. Dalam kes ini, tidak terdapat permohonan sebelumnya yang dibuat di Mahkamah Tinggi (lihat perenggan 10–11).

(2) Perayu-perayu tidak memberikan apa-apa sebab untuk membangkitkan s 44 Akta; atau kerana tidak membuat permohonan sebelumnya di hadapan Mahkamah Tinggi (lihat perenggan 13).

(3) Permohonan ini adalah bersifat penangguhan pelaksanaan dan memandangkan ini adalah kesnya, permohonan patut dibuat berikutan s 73 Akta, dibaca bersama s 43 Akta. Permohonan tidak patut dibuat berikutan s 44 Akta. Membuat permohonan yang didakwa tersebut berikutan s 44 Akta adalah penyalahgunaan seksyen tersebut (lihat perenggan 16).]

Notes

For cases on stay of execution, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1789–1800.

Cases referred to

Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspedisi Ria Sdn Bhd) [2002] 4 MLJ 113, CA (refd)

Legislation referred to

Companies Act 1965 s 150
Courts of Judicature Act 1964 ss 43, 44, 73

Appeal from: Originating Summons No 24–1187–08 of 2013 (High Court, Shah Alam)

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Gideon Tan (Shally Tan Yien Lee with him) (Gideon Tan Razali Zaini) for the appellants.
Justin Wee Kim Fang (Lim, Chong, Phang & Amy) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] By this notice of motion the applicants/appellants applied to this court for a stay of the execution of the order of the High Court of Shah Alam of 8 November 2013.

[2] By this order of 8 November 2013, the High Court of Shah Alam granted the respondent's originating summons application pursuant to s 150 of the Companies Act 1965; and had ordered the first appellant, Tamabina Sdn Bhd ('Tamabina') to, among others, call for an extraordinary general meeting of shareholders within seven days of the date of the order.

[3] The respondent (Nakamichi Corp Bhd) is the plaintiff at the High Court; whilst Tamabina is the first defendant before the High Court.

[4] The respondent is a public listed company and holds 51% shares in Tamabina.

[5] There is a dispute between the respondent and the directors of Tamabina regarding the management of Tamabina. The respondent is alleging, among others, that Tamabina has been refusing to provide its management account to the respondent.

[6] This dispute led to the respondent filing the said originating summons seeking, among others, an order that the first appellant calls for an extraordinary general meeting of the company.

[7] The respondent is opposing this motion on the grounds that it is an abuse of process of the court (a) by purporting to invoke s 44 of the Courts of Judicature Act 1964 ('the Act'); and (b) by reason of non-compliance with s 43 of the Act.

[8] We had unanimously dismissed this motion on 2 December 2013, and we now give our grounds.

[9] This notice of motion was filed by the appellants purportedly pursuant to s 44 of the Act. This provision states:

Incidental directions and interim orders

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(1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of the parties pending the hearing of the proceedings, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.

(2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.

(3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.

[10] In our judgment, by reason of s 43 of the Courts of Judicature Act that stipulates:

Applications

43 Whenever applications may be made either to the High Court or to the Court of Appeal, it shall be made in the first instance to the High Court.

there has, therefore, to be a prior application made before the High Court by the applicants/appellants for a stay of execution of the order.

[11] In the present case, however, it is conceded by Mr Gideon Tan (learned counsel for the appellants/applicants) that there has been no prior application made at the High Court.

[12] Mr Gideon Tan, nevertheless, submits that the applicants'/appellants' notice of motion application is made pursuant to s 44 of the Act; and that this section exempts the defendants from making a prior High Court application 'given the circumstances' of the present case, citing *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspedisi Ria Sdn Bhd)* [2002] 4 MLJ 113.

[13] With respect, we have carefully examined the applicants'/appellants' affidavit and we find that the applicants/appellants have not given any reason for invoking s 44 of the Act; or for not having made the prior application before the High Court.

[14] For the position that he takes, Mr Gideon Tan is relying on *Silver Concept*'s case. Yet if one were to examine the judgment in *Silver Concept*'s case one would have noted that the Court of Appeal had ruled (at p 119):

So, if an order is made to the prejudice of a litigant and a stay of that order is

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necessitated, then it is the High Court that must be moved for such a stay first before this court is approached.

[15] Then, at a later part of the judgment, the Court of Appeal further ruled (at p 120):

> Accordingly, it is our view that an application to this court under s 44 *which is not in the nature of an application for a stay of execution* may be made without the necessity of complying with s 43 of the Act. (Emphasis added.)

[16] In our judgment it is crystal clear in the present case that the application is in the nature of a stay of execution. Mr Gideon Tan does not appear to dispute this fact. And this being the case, the application then ought to have been made pursuant to s 73 of the Act, read with s 43 of the same Act. The application should not have been made pursuant to s 44 of the Act. To having made the application purportedly pursuant to s 44 of the Act is an abuse of that section.

[17] When an application for an interim relief can appropriately be made pursuant to s 44 of the Act (instead of s 44) has been clearly explained by the Court of Appeal in *Silver Concept*'s case, and we do not propose to repeat them here.

[18] Mr Gideon Tan further submits in the alternative that even if this court is of the view that there should have been a prior application made to the High Court, as required by s 73 read with s 43 of the Act, this court should not dismiss the motion, but to adjourn the application until s 43 is complied with. Learned counsel referred to that part of the judgment in *Silver Concept*'s case where Gopal Sri Ram JCA (as he then was), in delivering the judgment of the Court, states (at p 119):

> If, this court is moved for a stay without an application having been made to the High Court in the first instance, this court should normally adjourn such application until section 43 is complied with. In our view, this is plain upon a joint reading of ss 73 and 43. It is a view that derives some support from the judgment of Buhagiar J in *Annamalai Chettiar v Yeoh Kee Tin* [1956] MLJ 49. That was a case in which Buhagiar J sitting as a single judge of the former Court of Appeal dismissed an application for stay on the ground that the High Court had not been moved first. This is a course we would not approve as it increases costs and inconveniences the court and parties. An adjournment of the motion for stay until after the High Court has been moved is, in our view, the proper order to make.

[19] With respect, we are unable to agree with this remark which is an orbiter dicta. Section 73 of the Courts of Judicature Act merely states:

> Appeal not to operate as a stay of execution

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73 An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

[20] Reading s 43 with s 73, we fail to see anywhere in these sections implying that we should not dismiss the application (for not complying with s 43) but must grant an adjournment to enable the defaulting the applicants/appellants to comply with s 43 by going to the High Court to make the stay application.

Application dismissed with costs.

Reported by Kanesh Sundrum